IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 2 [illegible]

ALFRED MELVIN FELDSTEIN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

NO. 22344

FILED

[illegible]

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in Counts One, Two, and Three of a five-count indictment following trial by jury. [C.T. 63][1]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176(a). Jurisdiction of this

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[1] "C.T." refers to Clerk's Transcript.

rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in three counts of a five-count indictment [C.T. 2-6]. The first count alleged that appellant, with intent to defraud the United States, aided and abetted the smuggling of 130 pounds of marihuana into the United States from Mexico, by a co-defendant, contrary to law [C.T. 2, 3].

The second count alleged that appellant knowingly aided and abetted the concealment and transportation of 130 pounds of marihuana, by a co-defendant, that had been smuggled into the United States from Mexico, contrary to law [C.T. 4].

The third count alleged that appellant, David Delos Dodds, Frank Anthony Rosciano, and John Doe, aka "Scotty", and divers other persons to the Grand Jury unknown, agreed, confederated, and conspired together to commit offenses against the United States, namely, knowingly and with intent to defraud the United States, to import and bring into the United States from Mexico, marihuana, without presenting said marihuana as required by United States Code, Title 19, Sections 1459, 1461, 1484, and 1485, and to conceal, and facilitate the concealment and transportation of marihuana which had been imported into

the United States contrary to law, said agreement, confederation and conspiracy being in violation of Title 21, United States Code, Section 176(a) [C.T. 4, 5].

Appellant was not named in Counts Four and Five of the indictment [C.T. 7, 8].

Appellant's case was severed and jury trial of appellant commenced on May 11, 1966, before United States District Senior Judge Roger T. Foley [C.T. 14]. Appellant was found guilty by the jury as charged in Counts One, Two, and Three on May 13, 1966 [C.T. 63]. Thereafter, on June 24, 1966, appellant was committed to the custody of the Attorney General for a period of ten years and a fine of $10,000. on each of Counts One and Two, to run concurrently as to the time to be served and not the fine, and ten years on Count Three to run concurrent with the period of imprisonment on Counts One and Two, making a total sentence of ten years and $20,000. [C.T. 64-65].

Thereafter, on July 7, 1966, appellant filed a notice notice of appeal [C.T. 66].

III

ERROR SPECIFIED

Appellant specified the following points on appeal: [A.B. 4][2]

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[2] "A.B." refers to Appellant's Brief.

1. Appellant could not be convicted of "aiding and abetting" without the conviction of those allegedly aided and abetted.
2. Appellant could not be found "guilty" of conspiracy, without a finding of "guilty" of another alleged co-conspirator.
3. The Court (a) failed to properly instruct the jury on the meaning of the terms "intent", "specific intent", "knowingly", "fraudulently", "wilfully", and others; (b) erroneously instructed the jury in its instructions Nos. 10 and 11, since the elements referred to therein did not pertain to a crime charged against appellant; and (c) failed to instruct the jury on the precise language of Title 19, Chapter 4, Sections 1459, 1461, 1484 and 1485.
4. The Court erred in giving the jury an instruction in the language of Section 176(a), Title 21, relating to the presumption of violation from possession of marihuana, unless "defendant explains his possession to the satisfaction of the jury."
5. There was no evidence of "possession" by appellant and, therefore, not sufficient evidence to convict appellant; the instructions called for a presumption based on an inference.
6. Appellant was not properly advised of his legal rights before questioning and his statements were

improperly admitted into evidence.

IV

STATEMENT OF THE FACTS

On January 7, 1965, Frank Rosciano drove a 1963 Chevrolet, bearing California license number GWL 950, into the United States from Tijuana, B.C., Mexico, containing sixty-two packages of marihuana in both door panels and under the rear seat [R.T. 52-53][3].

The 1963 Chevrolet driven by Frank Rosciano was registered to North American Leasing Company, and was rented to Al Latae. This name was an alias of appellant [R.T. 56]. The automobile was procured pursuant to an agreement that was reached at a meeting between appellant, David Dodds, who resided with appellant, and John Doe, also known as Scotty, later identified as Scott Ollendorf. The latter three were witnesses for the government. Dodds testified that the meeting was held on January 1 or January 2, 1965 [R.T. 63]. Prior to the meeting, appellant and Dodds made arrangements to obtain marihuana. Apparently, Dodds was in Minnesota at the time Ollendorf was contacted by appellant and paid $1800 for purchase and delivery of marihuana. Dodds, upon his return,

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[3] "R.T." refers to Reporter's Transcript.

requested the aforementioned meeting with Ollendorf be called to make certain the terms of the buy and delivery arrangement [R.T. 65, 66].

At this meeting, Mr. Ollendorf desired assistance in order to assure the successful fulfillment of their order. Dodds agreed to accompany Ollendorf to Mexico on January 6 in order to make the buy, and thereafter meet Rosciano on January 7, 1965, at the Capri restaurant in Tijuana. Rosciano was to be the "mule" or transporter of the marihuana, and he was to use the car furnished by appellant.

At the meeting held on January 6, 1965, to discuss the proposed trip, appellant, Dodds, Ollendorf, and Rosciano were all in attendance [R.T. 68, 69].

After Rosciano arrived in Tijuana, on the morning of January 7, 1965, he, along with Dodds and Ollendorf, drove Dodds' 1964 Cadillac to the dealer's house in the mountains in the proximity of Tijuana. After procuring the marihuana the three men drove back to the Capri restaurant to pick up the "load" car. After loading the marihuana into the 1963 Chevrolet, a final check was made for debris. Rosciano drove the car to the border where he was ultimately apprehended. Although appellant was not with the three co-defendants at the time of the purchase, or present at the border when Rosciano was found with the marihuana, he was to share equally with Dodds once the marihuana was delivered [R.T. 70-74].

The appellant was given details of the events in Tijuana and of the border incident upon Dodds' return to Los Angeles [R.T. 104, 105].

On January 28, 1965, Louis Backrach, Customs Agent, working undercover, contacted appellant. This contact was for the purpose of making a purchase of marihuana. Bachrach made the initial contact by phoning appellant from his hotel and identifying himself as Charles Farrell [R.T. 209]. Bachrach testified that at the time of the initial contact with appellant he, Bachrach, knew nothing of the present case [R.T. 216].

Appellant and Bachrach met at Bachrach's hotel and during their meeting appellant made certain statements and admissions that had reference to "a load knocked off at San Diego," and referred to a partner named "David" [R.T. 212]. Appellant also told Bachrach the size of the load seized in San Diego [R.T. 214]. These statements were allowed into evidence after the court heard arguments concerning appellant's right to the constitutional warnings before answering any questions or making any statements while in the presence of the agent [R.T. 123-143]. According to the testimony of Mr. Bachrach, these statements were in the nature of a "boast", and not in response to any questions [R.T. 222].

V

ARGUMENT

A. APPELLANT MAY BE CONVICTED OF AIDING AND ABETTING WITHOUT A CONVICTION OF THOSE WHO WERE AIDED AND ABETTED.

B. APPELLANT MAY BE CONVICTED OF CONSPIRACY WITHOUT THE CONVICTION OF AN ALLEGED CO-CONSPIRATOR.

The appellant suggests, without authority, that in order to be found guilty of aiding and abetting someone must be found guilty of the crime for which he aided and abetted. It should be noted at the outset that there is no distinction under Federal law between one who is an aider and abettor of an illegal act and the principal. 18 U.S.C., Section 2(a). All parties are chargeable as principles. <u>Glass</u> v. <u>United States</u>, 328 F.2d 754 (7th Cir. 1964).

Clearly, the crime must be shown to have been committed in order to sustain a conviction of aiding and abetting, but it is not necessary that the principal be convicted or even his identity established. <u>Hendrix</u> v. <u>United States</u>, 327 F.2d 971 (5th Cir. 1964); <u>United States</u> v. <u>Provenzano</u>, 334 F.2d 678 (3rd Cir. 1964).

Appellant further argues that only because of the improper use of the inference in Title 21, Section 176(a) of the United States Code which allows for knowledge to be

inferred from possession, was the government able to prove the element of knowledge.

Appellant cites Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962) and contends that its holding precludes the use of the inference heretofore mentioned. Hernandez says, in effect, that possession in an agent may be imputed to the principal, but not the reverse. There can be no convincing argument made for the impropriety of the inference when the facts of the case at hand are compared with the holding in Hernandez. Appellant was a principal, not an agent.

There was independent direct evidence of personal knowledge and control on the part of appellant in this case that did not exist in the Hernandez case. Before control can be established, it is not necessary to show actual or physical possession. Rodella v. United States, 286 F.2d 306, 312 (9th Cir. 1960).

Appellant's second argument, although not explicitly discussed in the argument portion of his brief, but asserted in appellant's Points on Appeal is extremely weak in that it is directly contra to a holding in this jurisdiction. This court has plainly held that a defendant may be convicted of the crime of conspiracy without the conviction of his co-conspirator.

In Ng Pui Yu v. United States, 352 F.2d 626, 633

(9th Cir. 1962), this Court held that the acquittal of all the co-conspirators does not preclude the conviction of a remaining co-conspirator and further held it is not even necessary that co-conspirators be charged.

C. THE TRIAL JUDGE DID NOT ERR IN GIVING THE INSTRUCTIONS ON THE MEANING OF "INTENT", "KNOWINGLY", "FRAUDULENTLY", AND "WILFULLY"; TRIAL JUDGE DID NOT ERR IN INSTRUCTING THE JURY AS TO THE ELEMENTS OF COUNTS ONE AND TWO OF THE INDICTMENT; TRIAL JUDGE DID NOT ERR IN FAILING TO GIVE INSTRUCTIONS ON THE LANGUAGE OF TITLE 19, CHAPTER 4, SECTIONS 1459, 1461, 1484 AND 1485.

The appellant failed to object at trial to those instructions that he now, on appeal, challenges for the first time. The appellant also failed at trial to suggest alternative instructions to those now objected to [R.T. 228]. Appellant cannot now raise objections to the instructions without any evidence of prior objections. Rule 30, Federal Rules of Criminal Procedure. Cellino v. United States, 275 F.2d 941 (9th Cir. 1960).

The instructions given were standard instructions and were proper.

Instructions 10 and 11 [C.T. 28, 29] are applicable to the offenses charged in Counts One and Two.

D. THE TRIAL COURT DID NOT ERR IN GIVING THE INSTRUCTION ON POSSESSION.

Appellant's contention is grounded on the theory that no possession existed from which to draw the inference. Appellant states the following reasons in order to establish lack of possession: (1) he exercised no control and dominion over the cargo, and (2) he was not knowledgeable of the importation and transportation until after the United States' agents had seized the cargo. For the purposes of illustrating his contention, appellant sets forth the following facts: (a) he did not participate in any packaging or border-crossing activities, (b) he was 125 miles away from the border activities, and (c) the driver of the car was not under his control since he had nothing to do with his selection [A.B. 10].

The facts stated by appellant are legally salient only in rebutting any finding of actual possession; however, in no way do these facts weaken the finding of a joint constructive possession established with the following facts: (1) appellant was Mr. Dodds' partner in the venture, (2) appellant procured the automobile for the transportation, and (3) appellant paid money to Mr. Ollendorf for the marihuana's purchase.

In Quiles v. United States, 344 F.2d 490 (9th Cir. 1965) this Court, under almost identical facts of the present

case, held that the presumption was properly used. The Court stated:

> "The testimony of Rodriquez and Cordoba that they had been sent by appellant to pick up the marihuana (which they did) from a person to whom no payment was made was required and that they were acting at his direction was evidence from which it could honestly, fairly, and conscientiously be inferred that appellant exercised dominion over and control of the marihuana sufficient to raise the statutory presumption against him. The fact appellant was not shown to have been in the actual physical presence of those in actual possession does not obviate that inference or make the instruction to the jury concerning the statutory presumption not applicable to the facts in the instant case."
>
> Id. at 493.

See also Rodella v. United States, supra, at 311.

In a sense, appellant argues the evidence is insufficient to show possession in appellant. The evidence is overwhelming. The trial Judge said the appeal was not

taken in good faith [C.T. 69, 75-76]. The issue of sufficiency was not preserved. Appellant made no motion for judgment of acquittal during or following the trial.

E. TRIAL JUDGE DID NOT ERR IN RULING APPELLANT'S STATEMENTS TO AN UNDERCOVER AGENT ADMISSIBLE.

The propriety of using undercover agents in ferreting out criminal activity has been sustained by the United States Supreme Court. *Lewis* v. *United States*, 385 U.S. 206, 210 (1966); *Hoffa* v. *United States*, 385 U.S. 293, 303 (1966).

Appellant argues that the ruling of the trial Judge voided the "impact and requirements enunciated in *Miranda* and *Escobedo*."

Appellant was not in custody or deprived of his freedom in any significant way while at the Beverly Hills Hotel, and there has been no showing that the statements of the appellant were in response to any questioning or interrogation. Therefore, the appellant was not entitled to any constitutional warnings.

Miranda v. *Arizona*, 384 U.S. 436 (1966).

VI

CONCLUSION

Appellee respectfully submits that the conviction of the appellant should be affirmed.

Respectfully submitted,

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